Yale Law Journal

Volume 57
Issue 8 *Yale Law Journal*

Article 5

1948

REVIEWS

REVIEWS

THE CONFLICT OF LAWS: A COMPARATIVE STUDY. By Ernst Rabel. Volume Two. Foreign Corporations; Tort; Contracts in General. Ann Arbor, University of Michigan Law School. Chicago, Callaghan & Co. 1947. Pp. xli, 705. $8.00.

SOME day a legal historian will write the history of thought in the conflict of laws in this country since its earliest days in the nineteenth century. It will be a fascinating study, particularly when perspective has become greater and the influence of recent personalities has become less. Lorenzen has already given us a start,[1] but the full treatment can hardly yet be done.

Of course Story dominated the early days, and set many of the early patterns. More than fifty years ago Beale entered the field. He was a doughty protagonist, prodigious in effort and productive writing. He clearly felt the need of system and certainty in the field. He produced the system, taught it, expounded it, and sought through it to establish some element of certainty. In some ways his zeal was almost theological. Things simply could not be any way other than according to his system.

It was natural that such an approach should lead to opposition, and in due course it developed. This is not the place to discuss these views in detail. Professor Lorenzen, with the benefit of a background in comparative law, was one who spoke out. But the most vigorous assailant over a period of some twenty years was Professor Cook. It was perhaps fortunate for legal scholarship that Beale and Cook were both such vigorous personalities. It would have been more fortunate if they could have been more tolerant and understanding of each other. Cook wrote many articles to show that Beale's theories were not inevitably correct. Yet, their approaches were so different that the two men might as well have been working in different fields as far as their effect on each other was concerned.

In 1940, I was chairman of the Committee on Publication of the faculty of the Harvard Law School. At that time I proposed to Professor Cook that we should publish the book which he had long said that he wanted to put out in the conflicts field, of which his articles were planned as chapters. It was my thought that this would be a contribution to legal scholarship, and that it might serve in some way as a friendly gesture between what had come to be known as the "Harvard" point of view and the iconoclastic approach. As a contribution to legal scholarship the resulting book[2] has been worthwhile. As a step towards harmony it was not a success.[3]

1. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934).

2. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).

3. Professor Cook did not even acknowledge in the preface to the book the part which the Harvard Law School played in making it possible to publish the book.

When the manuscript came in, we made no suggestions for any changes in it. However, I did write to Professor Cook a general commentary on his point of view and approach. In brief, my suggestion was that his arguments were largely negative and destructive, that he showed that Professor Beale's conclusions were not inevitable, but that he did little to show what solutions should be reached in particular cases. The result of this letter was a new chapter for the book, entitled "In Conclusion." In this chapter, my letter to Professor Cook was quoted, but without mentioning my name, and a rather summary attempt was made to answer what I had said—all of which seemed to me to be largely confession, and a very little bit of avoidance. Although the book was then in pages, we immediately sent the new concluding chapter to the printer. After it was in type, we received a telegram from Professor Cook telling us not to print it. So we took it out, and it does not appear in the book. But within a few months after the book appeared, Professor Cook published the chapter, under the title "An Unpublished Chapter"—in two different legal publications.[4]

All of this is perhaps an unpardonably long and irrelevant beginning for a review of the second volume of the great work in the conflict of laws which has come to us from Ernst Rabel, with the support of the University of Michigan Law School, and under the general editorship of Professor Hessel E. Yntema. I prepared a brief review of the first volume,[5] in which I pointed out the remarkable background which Mr. Rabel brought to the work. The present volume fully measures up to the promise of the first. When the entire series is completed, we will have virtually a new treatise in the conflicts field, plus a treatment of comparative conflict of laws such as has never before been available in English.

The excuse for the introductory part of this review is that it seems to me that Rabel here has gone far to bridge the gap which was so deeply cut between Beale and Cook and their respective supporters. This is not done consciously. Although both authors are cited, there is no direct effort to set out their views, and evaluate or reconcile them. Instead, Mr. Rabel simply goes ahead and writes his views about various conflict of laws problems. But his knowledge of all the writings is so great, and his experience in comparative law is so unique, that what he has done often seems to be a synthesis of all or many views, and the reader often finds himself surprised at the harmony that is reached. Mr. Rabel writes without a trace of irritation or rancor, indeed almost without argumentation. But he writes well, and most persuasively about many points.

There is no general discussion in this volume, similar to the first hundred pages in the first volume, which I have found to be one of the most stimulating pieces of writing in the conflicts field. The present volume is confined to

4. 37 ILL. L. REV. 418 (1943), and 21 CAN. BAR REV. 249 (1943).
5. 7 FED. BAR J. 211 (1946).

three topics, as indicated by the title: corporations, torts and contracts. It would be interesting to take up and discuss various points in these chapters. It seems best, however, to confine my observations to the contracts chapter which is the best example of what I have in mind.

Professor Beale argued that the parties to a contract could not choose the law to govern it. They could not set themselves up as a legislature, he said. This view was expressed in articles, incorporated into his treatise and written into the Restatement. The other view has been taken with equal vigor. Somehow, these discussions have all seemed inconclusive, and contracts has remained one of the almost completely uncertain and confused fields in conflicts. Mr. Rabel's chapters are a breath of fresh air. He engages in no controversy, although he recognizes the various views. He simply develops the subject in such a way that it seems entirely clear that the intention of the parties should be recognized, within certain limits, which he discusses, too. Then he continues with an excellent chapter on "Rules in Absence of Party Agreement," which strikes me as the best thing available in English on the topic.

The book is not encyclopedic. It does not undertake to cite all the cases. (Indeed, it may be that the scholarly book which cites all the cases on a subject is now nearly past.) There is a very good selection among the cases, and these are woven into a discussion and analysis of the problems which is remarkable for its clarity and persuasiveness. In some parts of the book it is not clear that the comparative approach has contributed much, except as a novel bringing together of materials from other countries. But in the contracts chapters we have the real fruits of the comprehensive nature of Rabel's knowledge of the rules in many countries under different legal systems. This is comparative legal scholarship at its best.

There is probably no one in the world who is better qualified to do this sort of task than Mr. Rabel. Although the great part of his life was spent under the civil law, he shows that he has a clear grasp of common law principles and the common law approach. He has written a fine book, which should have a salutary influence on American conflict of laws. We are much indebted to him, and to the University of Michigan Law School which has made his work possible in this country.

ERWIN N. GRISWOLD†

† Dean and Professor of Law, Harvard Law School.

FREEDOM AND THE ADMINISTRATIVE STATE. By Joseph Rosenfarb. New York: Harper and Brothers, 1948. Pp. 274. $4.00.

FOR more than a decade the literature on public affairs has been heavily sprinkled with works of varying dimensions devoted to the issue of governmental intervention in the economic sphere. Most of the writers align themselves on one side or the other of this controversial question because it is not a subject which readily lends itself to dispassionate analysis. Mr. Rosenfarb has not broken precedent in this book. To him the case for the administrative state—his name for the government which exercises full control over the national economy—is beyond the realm of controversy. Not only is it good, it is inevitable, unavoidable. By drawing heavily upon the writings of a wide range of historians, anthropologists, philosophers, sociologists, psychologists —the enumeration is not complete—the author develops his argument.

In his quest for power man has passed through successive stages of political evolution to the present pattern of politico-economic organization. Civilization has advanced because division of labor has made possible the increase in productive power which is synonymous with economic progress. But division of labor produces only chaos unless a central coordinating instrument can synchronize divergent efforts toward a meaningful end. The hope that some impersonal mechanism such as the free market could perform this crucial function has not been realized because human institutions have not permitted the free market to exist.

It remains for the state to assume this responsibility. Mr. Rosenfarb believes that the Federal Government must assume the task of planning our entire economy. By this he means quantitative determination of specific production goals. In his own words:

> In wartime the government decided how many tanks, planes, and guns it needed and distributed the orders to private industry to fill under its supervision. . . . The same can be done in peacetime. We can ascertain the needs of the country in terms of housing, clothing, food, automobiles, refrigerators, electric appliances, etc. We can also take inventory of our natural resources, foreign imports, and industrial plants. We should be in a position to make accurate estimates of the desirable yearly production in each industry. The government would then assign a quota of production to each producer in the industry to fill, guaranteeing him against loss if he failed to sell the product.[1]

There is a note of the implacable, the fatalistic, in Mr. Rosenfarb's attitude toward the administrative state. "Though we cannot avoid the triumph of the administrative state, we can not only preserve freedom and democracy but

1. P. 64.

can bring them to unprecedented fruition in the administrative state."[2] "If government intervention in our economy were not indigenous to our civilization, its tempo of development would not have been increased by the war—the classic accelerator of historical processes."[3] "We shall now consider whether the administrative state controlling an economy of active planning, whose evolution is inevitable, can be a free and democratic state. The answer cannot affect the existence or nonexistence of an economy of planning, which is inevitable."[4] This theme is reiterated throughout the book.[5]

The author goes to great pains to point out that freedom—both economic and political—will not be jeopardized under the planning of the administrative state. We are assured that the government can produce full employment without imposing uniform standards upon production and consumption. "Uniformity is not part of economic planning. Planning for diversity is implicit in our great industrial capacity."[6] "Not only freedom of the consumer but the liberty of the entrepreneur will be enhanced in the democratic administrative state. There will be price and wage regulations, to be sure, but these will be the conditions and not the limitations of freedom of enterprise."[7] And again, "Economic planning is not incompatible with freedom of employment. To workers as well as to employers a planned economy will bring expanded economic freedom of larger opportunities for making economic choices."[8]

Mr. Rosenfarb is vague concerning the nature and degree of controls that he has in mind. He indicates that the decisions which determined where and how the individual employee would work would be made in "over-all economic decisions" in which the interests of labor, management, and the consumer would be represented. "Liberty implies choice, and choice involves a voice in the making of decision. This is implicit in the democratic character of the administrative state."[9]

These are heartening words, but what do they mean? When the author observes that "assignment of production quotas should serve as a challenge and not a constraint on business opportunities for there would be no compulsion to engage in business," there is reason to ask whether "free enterprise" has not fallen victim to semantic license. Until the control mechanism through which business decisions will be permitted to operate is set forth more explicitly than occurs anywhere in the book, such optimistic judgments as the ones herein expressed must be accepted with reservation. It is on the level of administrative control that the whole issue of central planning hangs. Until

2. P. xi.
3. P. 55.
4. P. 79.
5. Pp. 44, 135, 175.
6. P. 85.
7. P. 86.
8. P. 170.
9. P. 171.

and unless this problem is solved, successful governmental integration of the economy is illusory. What the author has in mind is so vaguely stated that it is impossible to give serious consideration to this proposal.

Although his administrative organization is largely undefined and wholly undeveloped, the author puts great faith in the efficacy of boards. He proposes a Public Requirements Board to ascertain total needs, a Resources Inventory Board to keep an inventory of our resources and plan their use and conservation, a Production Planning Board to do the over-all planning and supervision of production, a board to administer price control, and a board to integrate the wage-price relationship.[10] To these boards on the economic front he would add a Board of Dissemination of Information to insure adequate information for all.[11]

He explains his preference for the board form on the ground that "since these agencies would determine public policy, the board system is preferable to the single administrator, in order to afford a forum for differences of opinion."[12] This comment when coupled with his observations on administrative organization of the Federal Government[13]—where he does not mention these boards and how they are to fit into the administrative structure which he recommends—leaves one with the suspicion that his organizational thinking has not kept pace with his conception of desirable goals.

Mr. Rosenfarb makes his greatest contribution in his section on labor in the administrative state. Here he is on ground where he has not only a reading familiarity with his subject matter but brings to his discussion the kind of penetrating insight that comes from continuous personal contact. He writes with a sureness of touch that carries conviction not present in other sections. His argument has a cutting edge because it is specific and concrete. He discusses the Wagner Act and the Taft-Hartley Act trenchantly and makes his points clearly. Even where one disagrees it is necessary to respect the author's judgments, because he has solid reasons for his views.

Labor's expanding consciousness, its growing political importance are accepted as inevitable and healthy. The alternative modes of political self-expression are discussed. In the light of events during the past decade, the author examines the case for and against the use of the labor union as an instrument of both economic and political action. Should the union through its leaders attempt to commit its members to political decisions? Mr. Rosenfarb thinks not. He believes the individual member should be free to make his own political choices, because confusion of economic issues and political questions is likely to decrease the effectiveness of union leadership. It seems open to question whether such a position is consistent with the highly integrated

10. Pp. 73–4.
11. Pp. 91–2.
12. P. 74.
13. Pp. 224–9.

economic state the author visualizes, but he gives cogent reasons for his conclusions.

Mr. Rosenfarb has written an optimistic book. His faith in the ability of American administrative and organizational talent to synchronize our almost limitless productive capacity with consuming needs is stimulating, even though not entirely convincing. Perhaps he has a sweep and penetration of vision which illuminates the shadows and apparent gaps in his argument. To this reader these dark spots mar the placid beauty of a panorama sketched in such broad strokes. One can find little objectionable in the kind of world the book envisions. A planned economy which will remove all the defects of laissez-faire capitalism without sacrificing individual and group freedom is a pleasant prospect for anyone except a confirmed misanthrope. As a goal toward which during the next hundred years America may move haltingly and painfully, Mr. Rosenfarb's book is a useful contribution. As a blue print or building plan for the step-by-step progress toward that goal, it leaves something to be desired.

One can only hope that the author will devote his next work to a detailed analysis of the organizational and procedural problems of his administrative state.

LAWRENCE H. CHAMBERLAIN†

CASES AND MATERIALS ON THE LAW OF BUSINESS ORGANIZATIONS (CORPORATIONS). By Adolf A. Berle and William C. Warren. Brooklyn: The Foundation Press, 1948. Pp. xix, 1344. $8.50.

IN 1930 Berle liberated corporation finance from thralldom to the traditional corporations course by publishing CASES AND MATERIALS IN THE LAW OF CORPORATION FINANCE. Yet—he and Warren tell us in their new casebook—the need for reunion ("integration") was apparent "from the beginning." Their new book presents "as a single course of study the basic data of both the conventional corporate field and of corporation finance." It should be no surprise that the colony, having thrived in independence, is the dominant partner in the new union.

While the new volume, which seems to me to be the best in the field, is in no sense merely a revised edition of Berle (1930), or of Berle and Magill (1942), the 1942 volume is the central core of the present work: Part II ("Capital Stock and Its Property Or Contract Rights"), Part III ("Public Issue of Stock"), and Part IV ("Funded Debt") embrace much of the old book. There are important changes, however, both by way of welcome abbreviation (the unexciting state Blue Sky materials have been cut to a single

† Associate Professor of Government, Columbia University.

case and a few pages of text) and of addition (*e.g.*, cases on the elimination of preferred dividends arrearages). The materials on increases in stock and preemptive rights have been trimmed and re-arranged. The authors recognize the importance of an introduction to corporate accounting, and have included some useful materials on this subject, which represent an improvement over the earlier volume.

The major departures from the 1942 volume, of course, are the new sections, representing perhaps half the present work, which carry out the authors' purpose of integrating the conventional corporate field with corporation finance. (While the authors do not suggest the time to be devoted to the course, it hardly seems possible to do justice to the materials in less than two semesters of three hours each.) The "integration" takes the form of Part I ("Creation of the Corporation"), Part V ("Management and Operation"), Part VI ("Stockholders' Remedies for Mismanagement") and Part VII ("Sale, Merger, Consolidation and Dissolution").

Part I is something of a catch-all, in which the authors offer a set of incorporation papers as exhibit A and then deal briefly but suggestively with the *ultra vires* doctrine and with pre-incorporators. They then take up modification of the corporate "contract" by the state and by the directors and stockholders in what strikes me as the weakest part of the book. The authors recognize that amendments to state corporation laws are often drafted if not dictated by self-serving interests to effectuate what can be called state policy only in a Pickwickian sense. The "state" may be lending its aid to the majority's board of directors as against the minority stockholders; the constriction of stockholders' suits by Section 61-b of the New York General Corporation law shows that Delaware is not the only haven for refugees from fiduciary duties. Can a way be found to curb state legislatures which are acting perversely without redelivering them into bondage to the due process clause? Is Stone's famous footnote[1] in United States v. Carolene Products Co., 304 U. S. 144, applicable here? Berle and Warren hardly suggest the depth of the issue. Finally, Part I offers a selection of cases on the de facto doctrine and on disregard of the corporate fiction.

Parts V, VI and VII seem to treat adequately their respective problems. The fiduciary obligation of corporate managers is not dealt with until Part V (p. 921). As a consequence of this unconventional postponement, the student should come to the subject able to appreciate clearly the financial effects of the activities which are challenged by minority groups. On the other hand, the fiduciary principle will already have been encountered briefly in connection with the valuation of property, the declaration of dividends, and the rights of preferred shareholders.

The book is limited to the corporate device for assembling and investing

1. See Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L. J. 571, 579 (1948).

capital, to the exclusion of individual proprietorships and unincorporated groups. The "functional approach" called for by Douglas almost twenty years ago[2] is echoed in the titles "business units," "business associations," and "business organization." While Frey, Dodd and Baker, and Berle and Warren use the generic trademark, only Frey applies it; Dodd and Baker, like Berle and Warren, add the specific label "corporations" and it is this qualification which correctly brands their works. And, indeed, perhaps there is only illusory promise in a comparison, for example, of the capital contributions of individuals and partners with the public issue of securities by corporations, or of the partner's right to an account with the stockholder's right to information. It may be that Steffen's *Cases on Agency*, with its fruitful juxtaposition of unincorporated and incorporated enterprise with respect to limited liability and the scope of managerial authority, has made the comparison at the most useful points.

Yet even while restricting their range to the corporation, Berle and Warren could have related their structure more effectively to the life-history of business enterprise. The "assembling of funds"—promotion—is split by the authors into four enclaves: the relation of pre-incorporators to each other and the corporation's liability on pre-incorporation agreements (66-92); the non-public issue of stock (230-381); the public issue of stock (731-850); and the fiduciary duties of promoters (929-958). The purpose of this organization (though it can be corrected in part by skipping from one place to another) is not easily grasped, especially in a book whose keynote is "integration." True, the promoter is a "fiduciary," as are the director and the dominant stockholder, with whom he is grouped. But if an amorphous label for a diversity of remedies is to govern pedagogy, the law of business management could be turned over to the course in Trusts. Surely, the authority of the "pre-incorporator" to bind the corporation, the common law restrictions on "promoter's" profits, the state Blue Sky laws, and the Securities Act of 1933 bear equally on the "assembling of funds" and can best be approached as aspects of a single process. In this connection, the neglect of investment banking (which was treated in Berle, 1930) is regrettable. Without knowledge of the process of marketing securities, the student will not grasp the significance of the Security Act's 20-day waiting period or of the way in which pre-emptive rights hinder access to the public money market. A distressing failure to contrast statutory with common law remedies characterizes the section on the purchase of stock by corporate managers; the SEC's pregnant Rule X-10B-5 is ignored and Section 16(b) of the Securities Exchange Act is quoted but without comment or citation of authority. Moreover, the treatment of the SEC's control of proxy solicitation is quite inadequate. These shortcomings are especially surprising in the light of Berle's early single-handed explorations in these very fields.

The inclusion of funded debt—which sets off the present work, like its

2. *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673 (1929).

predecessors, from other casebooks—is a great advantage; as is recognized,[3] the legal distinctions between preferred stockholder and bondholder do not correspond to financial reality. Yet the cases on the elimination of preferred dividends arrearages are not balanced by even a glimpse of the impact of reorganization on the rights of bondholders. Moreover, the treatment of funded debt might well have led into a consideration of still other means of raising funds, such as equipment trusts, chattel mortgages and conditional sales, term loans, and inventory and accounts receivable financing. Some mention of these devices seems essential not only to supplement the brief treatment of the after-acquired property, income, and negative pledge clauses of corporate indentures, but also because they may serve as substitutes for the flotation of funded obligations.

Berle and Warren tell us in their Foreword that the modern corporation has changed from "a vehicle for profit-making investment" into "a social institution, wielding enormous power, responsible in great part for providing employment, developing technique and resources, supplying necessary goods and services, influencing community development, gravely affecting the lives of great numbers of people, and appreciably influencing sociological and political evolution." This gives rise to their prophecy that "the great legal battles in corporation law in the next generation" will probably be fought in the sociological rather than in the financial arena. Yet despite this stirring conception of corporate law, and despite the authors' assertion that "no apology" is required for including comments relevant to these issues, the book's fundamental orientation is toward the financial frontiers along which Berle was so prescient a pioneer. Indeed, a quotation from Burnham's discredited *Managerial Revolution,* excerpts from the 1932 Dodd-Berle exchange[4] on the breadth of corporate managers' responsibility, and a recent proposal for "responsible capitalism" by John Fischer seem to be the principal materials for which the authors feel it necessary not to apologize.

Though in this respect—as in some others—the authors' reach exceeds their grasp, the gap reflects both the richness of their aims and the poverty of current thought about the corporation. Their book is superior in breadth, suggestiveness and vigor, and should serve, as they hoped, to bring together corporation finance and the traditional corporations course into a fruitful union.[5]

BORIS I. BITTKER†

3. Pp. 499, 899.

4. Dodd, *For Whom Are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145 (1932) and Berle, *For Whom Corporate Managers Are Trustees: A Note, id.* at 1365.

5. It is therefore especially a pity that the publishers have done so atrocious a job of bookmaking: the paper is too thin, the type is set too tightly, and there is an unconscionable amount of fine print. (There arrived in the mails as I completed this review a well-printed brochure from the publishers, announcing that "we, once again, are able to do the type of work which has long distinguished us as a leader in the improvement of the physical features of casebooks." One can only hope that Berle and Warren is classed as a war-time, not as a peace-time, product.)

† Associate Professor of Law, Yale Law School.

ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860. By Louis Hartz. Cambridge: Harvard University Press, 1948. Pp. 320. $4.00.

THE author of this volume, an assistant professor of government at Harvard, has produced an effective example of the synthesizing of materials and techniques from several different disciplines. He has developed his thesis by calmly and profitably invading the preserves of the sociologist, the economist, the political scientist, the lawyer, and the historian, without even a self-conscious nod at any "Keep off the Grass" signs. To be sure he is dealing with a problem offering enough different facets to invite representatives of all the social sciences to take a close look. But he approaches it alone and with an obvious sense of obligation to achieve an effective synthesis. This he has done with success.

The investigation is the second in a series of four Studies in Economic History, prepared under the direction of the Committee on Research in Economic History of the Social Science Research Council. It follows the volume on Massachusetts by Oscar and Mary Handlin published in 1947.[1] Similar studies focusing on Georgia and Illinois are scheduled to appear later. All four projects seek an understanding of the relationship between government and economic life in the pre-Civil War period, both the relationship as it existed in fact and the relationship as it appeared in theory.

Pennsylvania seems the ideal subject for such an inquiry. Here, at the beginning of the period, stood a state already rich in business experience, with a colonial heritage of shipping activity, of merchant venturing in the west, of developed urban life. Here, too, political theorists like Franklin and Wilson had aired their judgments and opinions. The social conscience was strong, goaded by the Quaker influence. Immigration problems and the presence of non-English stock were far more familiar to the Pennsylvanian of 1787 than to his brother in Massachusetts. And in the years which passed between the war of 1776 and the war of 1860, the Keystone State continued to present within its borders examples of every important phase of economic, social, political, and intellectual life identified with the country as a whole.

Professor Hartz has made the most of the opportunities thus presented to him. He has concerned himself with transportation, from the turnpike and canal programs to the rise of the Pennsylvania Railroad system; with every phase of banking; with labor problems and labor legislation; with the long history of the corporation and the theories of control which that history stimulated; with the making of statutes and the operation of courts; with sectionalism within the boundaries of the state; with political parties and their changing alignments.

An example of sound analysis, in considering the state as promoter and

1. Reviewed in 57 YALE L. J. 333 (1947).

entrepreneur, emerges from the section on public works. The author concludes that the state's attitude toward the principle of public ownership had advanced through four well-defined stages between 1785 and 1835: "(1) The period immediately after the Revolution in which the state assumed complete responsibility for the construction and operation of turnpikes. (2) The period from 1791 to 1825 when the state began to rely increasingly upon private and mixed corporations and when complete public ownership was challenged on practical grounds. During this period public ownership was universally acknowledged, as before, as being within the legitimate sphere of state action. (3) The period of the initiation of the public works system when public ownership was not only accepted as legitimate but was believed by the overwhelming mass of Pennsylvanians to be practical and desirable as well. (4) The period after 1830 when, in controversies over the use of the public railways, the legitimacy of ownership as a governmental function began to be challenged for the first time, and in a vague way."[2]

From the well-organized segments of material the major thesis gradually evolves: that democratic thought in Pennsylvania between 1776 and 1860 was anything but "laissez-faire" in its conception of the proper relationship between government and economic life; that, on the contrary, it held to a broad doctrine of state economic action. The oft expressed opinion that Government intervention in economic life, so important in the post-Civil War era, succeeded an earlier period of "laissez-faire" suffers a severe blow as a result of this study. The Federal Government's increasing role in the economic sphere, after 1865, would appear to follow not an age of "laissez-faire" but instead an age of vigorous state activity. The shift was not from non-intervention to intervention but rather from the strong arm of the state government to the strong arm of federal authority.

Thus the chief contribution of the study is to attach the label "myth" to the supposed freedom of American economic life from political interference, prior to 1860. "In face of the evidence," Hartz declares, "it would be hard to contend that the objectives of economic policy cherished by the state from the Revolution to the Civil War were either limited or unimportant. They ramified into virtually every phase of business activity, were the constant preoccupation of politicians and entrepreneurs, and they invoked interest struggles of the first magnitude."[3]

The author might well have gone one step further and tied up the shift from state activity to federal with the whole story of the nationalizing of business in the late nineteenth century. This projection to the period beyond the limits of the study itself would have caused little strain to the concluding chapter and would have integrated the study more completely into the main stream of American economic history.

2. Pp. 165–6.
3. P. 289.

Incidentally, this is not "history for the tired business man." It is closely written and the going is often hard. A critical bibliography, in place of the alphabetical list of sources and authorities, would have been welcomed by this reviewer. But these observations are somewhat picayune against the impressive amount of scholarship, the sound organization of material, and the significant interpretations which characterize the work as a whole.

ROLLIN G. OSTERWEIS†

1946 ANNUAL SURVEY OF AMERICAN LAW. By New York University School of Law. Washington Square East, New York, 1947. Pp. xciv, 1947.

DEAN, now Judge Arthur T. Vanderbilt, and his colleagues of the New York University School of Law, have again placed the legal profession under great obligations. The 1946 Survey of American Law, an immense book, called upon many specialists to make up the volume. It is appropriately dedicated to the men primarily responsible for the Reorganization Act of August 1946. Though this is not meant as a criticism, in his preface Dean Vanderbilt might have called attention to the fact that the Federal Tort Claims Bill, more revolutionary in many respects than the other parts of the Reorganization Act, was included.

For the most part the contributions come from the same contributors to which we have become accustomed, but there are some new sections and some new contributors. We would designate for special commendation the table of cases, the statutes discussed, and the index. This is the kind of work which requires the utmost skill and thought and rarely receives the commendation it deserves. Like much work in this world, it appears anonymously, but hours must have been devoted to this service. We are glad to see the restoration of the discussion of Civil Remedies and Procedure by Professor Alison Reppy. This is one of the best chapters in the book. In connection with the use of the declaratory judgment in *Colegrove v. Green,* the reviewer, who was of counsel, was unaware of the fact that the Supreme Court had indicated that the Declaratory Judgments Act "was not then in effect."[1] Attention may be called to the fact that the Illinois legislature did, as a result of Judge Evans' criticism, redistrict the state shortly after the Supreme Court decision. Professor Colegrove, therefore, actually may be regarded as the victor in the case, though officially he appears as a loser.

There is so much of value in this volume for the G.I. who lost several years, as well as for the rest of the profession, that it would be stultifying to

† Research Assistant in History, with the rank of assistant professor, Yale University.

1. Pp. 1136-7.

name any chapter as superior to any other. They all invoke court decisions, statutes, and periodical articles. They are written in lively form, so that the reading is facilitated. The reader may question whether the first chapter on International Law does not contain more politics than law, but the information given is in useful form, which is much to be appreciated. Judge Vanderbilt is to be congratulated on assembling so competent a staff. Having reviewed the earlier volumes, the writer is struck by the enormous amount of work that must have gone into these volumes. If none of the contributors ever did anything else, they will have more than justified their professional standing by what they have already accomplished.

EDWIN BORCHARD†

† Justus S. Hotchkiss Professor of Law, Yale Law School.